

Eldeco, Inc. and International Brotherhood of Electrical Workers, Local 776, AFL-CIO

Eldeco, Inc. and International Brotherhood of Electrical Workers, Local 342, AFL-CIO. Cases 11-CA-16006, 11-CA-16140, and 11-CA-16181

July 29, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING
AND COHEN

On June 9, 1995, Administrative Law Judge Howard I. Grossman issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief¹ and has decided to affirm the judge's rulings, findings,² and conclusions and to adopt the recommended Order as modified and set forth in full below.³

1. In adopting the judge's conclusion that the Respondent unlawfully promulgated and disparately enforced a drug-testing policy in order to discourage union activities, we fully recognize that a nondiscriminatory drug-testing policy may serve legitimate employer interests in addressing the problem of drug

¹ The Respondent has requested oral argument. The request is denied as the record, exceptions, and brief adequately present the issues and the positions of the parties.

² The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent also has excepted to the judge's decision on the basis that it evidences bias and prejudice. After a careful examination of the record and the judge's decision, we are satisfied that this contention is without merit.

In adopting the judge's 8(a)(1) findings, we find it unnecessary to determine whether Project Superintendent Norman Mastalz' June 8, 1994 comments about unions were coercive inasmuch as that finding is cumulative to the judge's other 8(a)(1) findings.

In adopting the judge's finding that Terry Christie was a statutory supervisor, we rely solely on the credited evidence that Christie effectively discharged employee Gregory Davis. In view of Christie's action in this matter, it is evident that Christie possessed the authority to discharge.

In adopting the judge's findings that the applicant-discriminatees in this case were bona fide applicants for employment and "employees" within the meaning of the Act, we note that subsequent to the judge's decision, the Supreme Court issued its opinion in *NLRB v. Town & Country Electric*, 150 LRRM 2897 (1995), in which the Court endorsed the Board's position that paid union organizers are employees within the meaning of Sec. 2(3) of the Act.

³ We shall modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

abuse in the work force. The credited evidence in this case, however, shows that the purpose of the drug-testing program here was to "get rid" of union supporters and thus was intended to serve the illegitimate purpose of retaliating and discriminating against union supporters. Thus, even if, as the Respondent contends, the Respondent's discharges of Stephen Pope and Waco Cunningham were motivated by their refusal to take drug tests, rather than by their union sympathies, as found by the judge, their discharges would violate Section 8(a)(3) and (1). See *CBF, Inc.*, 314 NLRB 1064, 1075-1076 (1994). Further, in these circumstances, we find that the Respondent's August 3, 1994 letters to some of the discriminatees indicating that work was available and that those interested should contact the Respondent to arrange for a drug test do not constitute valid offers of employment.

2. As the judge found, the Respondent hired numerous electrician helpers at its North Charleston jobsite. The judge found that alleged discriminatee Thomas Flood Jr. was qualified to be a helper and that the Respondent impermissibly failed to employ him. On examination by the General Counsel, however, Flood Jr. testified that he was not capable or qualified to perform the work performed by helpers at the jobsite. We conclude that Flood Jr.'s alleged lack of qualification for the job was not the reason for the Respondent's refusal to hire him. Rather, that refusal to hire was based on discriminatory considerations. Thus, the refusal was unlawful. With respect to Flood Jr.'s admission that he was not qualified for the job, we leave to compliance the issues of whether this admission, and any other relevant evidence, should operate to preclude reinstatement and/or toll backpay.⁴

3. The complaint alleges that the Respondent refused to employ (and failed to consider) the applicant-discriminatees. The record shows that the Respondent employed 35-40 employees at the North Charleston K-Mart project after its commencement in March 1994.

⁴ Chairman Gould agrees that the Respondent's refusal to hire Flood Jr. was based on discriminatory considerations and was unlawful. However, in light of Flood Jr.'s testimony that he was not capable or qualified to perform the work and was thus not a qualified applicant, Chairman Gould would not order his reinstatement and would leave for compliance the issue of whether his backpay should be tolled as of the time that the Respondent learned of his lack of qualification for the job. Chairman Gould's general position on remedies is that reinstatement and other traditional remedies are not to be awarded automatically. Cf. his concurring opinion in *Paper Mart*, 319 NLRB 9 (1995). See also *Precision Window Mfg.*, 303 NLRB 946 (1991), enf. denied 963 F.2d 1105 (8th Cir. 1992); Member Walther's opinion in *Atlas Tack Corp.*, 226 NLRB 222, 224 (1976). Like his concurring opinion in *Paper Mart*, these opinions stress the importance of flexibility in tailoring the remedy to the particular circumstances of each case.

Contrary to the implication of Chairman Gould, we are not awarding a remedy "automatically." Similarly, we would not deny the remedy automatically. Rather, we leave the matter to compliance, so that there can be further development of relevant facts.

There are nine discriminatees who applied in North Charleston. The Respondent employed about 19 employees at its Winston-Salem project and still sought additional qualified employees. There are 14 discriminatees who applied in Winston-Salem. In these circumstances, in which it appears that the discriminatees were denied employment for discriminatory reasons to actual positions that became available, and for which they were qualified, we adopt the judge's make-whole order with the understanding that appropriate remedial determinations for each discriminatee, such as when possible backpay began to accrue, or may have terminated, shall be considered in the compliance process. *Casey Electric*, 313 NLRB 774 (1994). Cf. *Ultrasystems Western Contractors*, 316 NLRB 1243 (1995).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Eldeco, Inc., North Charleston, South Carolina, and Winston-Salem, North Carolina, its officers, agents, successors, and assigns, shall

1. Cease and desist

(a) Telling employees that a foreman had been hired to keep the jobsite union free.

(b) Interrogating employees concerning the union activities of other employees.

(c) Threatening employees with unspecified reprisals for engaging in union activities.

(d) Telling employees that there will not be any union employees on the job.

(e) Telling an employee that he was being terminated for engaging in union activities.

(f) Creating an impression of surveillance of its employees' union activities.

(g) Promulgating and disparately enforcing a drug-testing policy in order to discourage the union activities of its employees.

(h) Telling employees that the purpose of the drug-testing program was to get rid of union employees.

(i) Discouraging membership in the International Brotherhood of Electrical Workers, Local 342, AFL-CIO, the International Brotherhood of Electrical Workers, Local 776, AFL-CIO or any labor organization by discharging employees of refusing to consider or to employ applicants for employment because of their union or other protected activities, or by discriminating against them in any other manner with respect to their hire, tenure of employment, or terms and other manner with respect to their hire, tenure of employment, or terms and conditions of employment.

(j) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Gregory Davis, Stephen Pope, and Waco Cottingham full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Gregory Davis, Stephen Pope, and Waco Cottingham whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(d) Within 14 days from the date of this Order, offer employment to the discriminatees listed on Appendix A.

(e) Make the discriminatees listed on Appendix A whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(f) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its office in Greenville, South Carolina, and at its branch office in Charleston, South Carolina, and at its jobsites in South Carolina and North Carolina copies of the attached notices marked "Appendices A and B."⁵ Copies of the notices, on forms provided by the Regional Director for Region 11, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notices to all current employees and former employees

⁵ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

employed by the Respondent at any time since August 23, 1994.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX A

List of Discriminatees

Thomas Flood Sr.	Patrick Parsons
Thomas Flood Jr.	Mack Good
Doug Michi Jr.	Allen Samuels
Sean Taylor	Randy Penn
Vernon Taylor	Michael Thompson
David Smith	Gary Maurice
James Anderson	Stanley Thompson
John C. Frazier	Russell Hawks
Joel Yon Jr.	Kenneth Hanks
Kim Farley	Daniel Vella
Larry Morgan	John Compton
Paul Vogler	

APPENDIX B

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid and protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT tell employees that a foreman had been hired to keep the jobsite union free.

WE WILL NOT interrogate employees concerning the union activities of other employees.

WE WILL NOT threaten employees with unspecified reprisals for engaging in union activities.

WE WILL NOT tell employees that there will not be any union employees on the job.

WE WILL NOT tell employees that they are being terminated for engaging in union activities.

WE WILL NOT create an impression of surveillance of our employees' union activities.

WE WILL NOT promulgate and disparately enforce a drug-testing program for the purpose of discouraging the union activities of our employees.

WE WILL NOT tell employees that the purpose of the drug-testing program is to get rid of union employees.

WE WILL NOT discourage membership in International Brotherhood of Electrical Workers, Locals 342, and 776, AFL-CIO or in any other labor organization, by discharging employees or refusing to hire applicants for employment, because of their union sympathies, or by discriminating against them in any other manner with respect to their employment.

WE WILL NOT in any other like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Gregory Davis, Stephen Pope, and Waco Cottingham full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL, offer employment to the applicants for employment on the attached list [Appendix A] and make them whole, with interest for any losses they may have suffered.

ELDECO, INC.

Jasper C. Brown, Esq., for the General Counsel.

Kenneth E. Young, Esq. and *Cherie Blackburn, Esq.* (*Nelson, Mullins, Riley & Scarborough*), of Greenville, South Carolina, for the Respondent.

Gary Maurice, Business Manager, Local 342, of Winston-Salem, North Carolina.

Nathan Edgar, Esq., of Paragoula, Arkansas, and *Donald M. Cockroff*, Business Manager, Local 776, of North Charleston, South Carolina, for the Charging Party.

DECISION

STATEMENT OF THE CASE

HOWARD I. GROSSMAN, Administrative Law Judge. This proceeding involves charges that Eldeco, Inc. (Respondent or the Company) committed unfair labor practices at two different jobsites—North Charleston, South Carolina, and Winston-Salem, North Carolina. Both jobs involved electrical work in the construction of new K-Mart retail stores. The charge pertaining to the North Charleston jobsite was filed by International Brotherhood of Electrical Workers, Local 776, AFL-CIO (Local 776), and the Winston-Salem charges by International Brotherhood of Electrical Workers, Local 342, AFL-CIO (Local 342) (jointly referred to as the Union).¹

¹ The charge in the North Charleston case (Case 16-CA-16006) was filed on May 6, 1994. All cases are in 1994 unless otherwise specified. The charge in Case 11-CA-16140 (Winston-Salem) was filed on July 28, with amended charges on September 8, 21, and 29.

Continued

After issuance of an original complaint, a consolidated complaint issued on October 31. As amended at the hearing, it alleges that, at the Winston-Salem jobsite, Respondent violated Section 8(a)(1) of the Act by (1) advising its employees that union affiliated employees would not be hired; (2) telling employees that it hired a foreman to keep the jobsite union free; (3) interrogating employees regarding the union activities of other employees; (4) threatening its employees with unspecified reprisals for engaging in union activity; (5) telling its employees that it would not have any union employees on the job; (6) telling an employee that he was being terminated because of his union activity; (7) discriminatorily prohibiting its employees from discussing the Union on the job; (8) creating the impression that it was engaged in surveillance of its employees' union activities; (9) promulgating and disparately enforcing its drug-testing policy in order to discourage union activities by its employees; and (10) threatening to discharge employees supporting the Union by implementing a drug-testing policy.

The complaint also alleges that, at the Winston-Salem jobsite, Respondent discharged employee Gregory Davis, and failed to consider and refused to offer jobs to 16-named applicants, because of their union activities and sympathies, in violation of Section 8(a)(3) of the Act.

At the North Charleston jobsite, the complaint alleges, Respondent failed to consider and failed and refused to offer jobs to nine applicants because of their union activities, in violation of Section 8(a)(3) of the Act.

A hearing was held before me on these matters in Charleston, South Carolina, on January 18, 19, and 20, 1995. Counsel for the General Counsel made oral argument at the hearing, and, thereafter, Respondent submitted a brief. Based on the entire record, including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a South Carolina corporation, with an office in Greenville, South Carolina, a branch office at Charleston, South Carolina, and jobsites at North Charleston, South Carolina, and Winston-Salem, North Carolina, where it is engaged in electrical construction work. During the 12 months preceeding issuance of the complaint, a representative period, Respondent purchased and received, at its North Charleston, South Carolina jobsite, goods and materials valued in excess of \$50,000, directly from points located outside the State of South Carolina, and received at the same jobsite gross revenues in excess of the same amount. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

The Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED SUPERVISORY STATUS OF TERRY CHRISTIE AND CHARLES GARCIA

A. Summary of the Evidence

1. The Winston-Salem jobsite and its employees

Some of the Company's alleged unlawful acts were assertedly committed by Terry Christie and Charles Garcia at the Winston-Salem jobsite. The complaint alleges and the answer denies that both were supervisors and agents of the Company.

Christie testified that the Winston-Salem jobsite comprised 178,000-square feet on one level, with three to four jobs going on simultaneously in different areas. Alleged discriminatee Douglas Summers affirmed that the area was 4 city blocks in size, and that there were 15 to 20 simultaneous worksites. The number of the Company's employees ranged from 7 to about 25, depending on the stage of the job.

2. Charles Garcia and Terry Christie

Garcia was the "foreman" on the job when it started, but left and was replaced in July by Christie. The latter was raised from \$10 to \$12 hourly, slightly less than Garcia had been making. Christie said that he was a "working foreman" and worked with his tools 60 to 70 percent of the time. He denied authority to hire or fire. Attempting to distinguish between his status and that of Garcia, Christie stated that Garcia directed employees on what work to perform. Christie contended that, every morning, Project Superintendent Norman Mastalz² told him what jobs had to be performed that day, Christie did not assert that Mastalz told him which employee was to perform each job.

Christie also contended that Garcia kept employee time records and maintained invoices and packing slips, whereas he, Christie, did neither. Mastalz supported the asserted distinction between Christie and Garcia.

Christie admitted that he moved helpers from one job to another. However, he contended that, before moving an electrician, he "usually" checked with Mastalz. It is difficult to see why Christie did this, if it was he who made the initial assignment.

Superintendent Mastalz agreed that he and Christie were the only "supervision" on the job. He further testified that he had too many responsibilities to see that the work was done. This was Christie's responsibility. If one job was finished, Christie moved the crew to another job. Employee Jeffery McDaniel testified that Christie had blueprints, transferred McDaniel from one job to another, and that Mastalz "never came around." Employee Tony Heath affirmed that Christie maintained employee time records.

B. Factual and Legal Conclusions

Section 2(11) of the Act sets forth various indicia of supervisory status, including the authority to "assign" or "responsibly to direct employees," where the exercise of such

²The pleadings establish that Mastalz was a supervisor and an agent of Respondent.

The original charge in Case 11-CA-16181 (Winston-Salem) was filed on August 23 and an amended charge on October 31.

authority requires “independent judgment.” “The functions of a supervisor listed in the statute are disjunctive; the Board need not show that an employee performed all or several of the functions to support a finding of supervisory status.” *NLRB v. Dadco Fashion*, 632 F.2d 493, 496 (5th Cir. 1980), *enfg.* 243 NLRB 1193 (1979).³

I find that Project Superintendent Mastalz each morning gave Christie a list of jobs to be performed, but did not assign particular jobs to particular employees. It was Christie who did this, and who moved employees from one job to another as each was completed. He also resolved employee problems. As Mastalz frankly admitted, he himself did not have time to do this, a statement buttressed by the large size of the worksite and the variety of different jobs being performed simultaneously. Mastalz admitted that he and Christie were the only “supervision” on the job. If Mastalz did not have time to see that the employees did the work, and if Christie was not a supervisor, the employees would have been working without supervision.

Christie’s statement that he worked with his tools 60 to 70 percent of the time is implausible—the employees would have been working without supervision if this were true. I credit McDaniel’s testimony that Christie simply laid out work, and did not work with his tools. I also credit Tony Heath that Christie kept employee time records.

I conclude that Christie assigned work, that he responsibly directed employees in its performance, and that this involved independent judgment.

At least two circuit courts of appeal have sustained the Board’s findings of supervisory status where responsible direction of work constituted a key factor in the Board’s conclusions,⁴ and one where the monitoring of timecards was a factor.⁵

Based on the record and the authority cited, I conclude that Christie was a supervisor and an agent of Respondent. Since Garcia had more authority than Christie, according to Respondent’s witnesses, it follows that he also was a supervisor and an agent.

III. THE HIRING AND DISCHARGE OF GREGORY DAVIS— ALLEGED STATEMENTS BY CHRISTIE AND GARCIA

A. Summary of the Evidence

Gregory Davis applied for work to Superintendent Mastalz on July 7. Although Davis was a union member, he did not disclose this fact, and there was no discussion of the Union. Mastalz hired him immediately, and asked whether he would consider being a foreman. Davis replied that would need a pay raise and authority to hire and fire. Thereafter, Davis recommended several individuals for employment, and all were hired.⁶ Mastalz asked him to recommend others.

³ See also *NLRB v. Brown Specialty Co.*, 436 F.2d 372, 375 (7th Cir. 1971), *enfg.* 174 NLRB 519 (1969).

⁴ *NLRB v. Dadco Fashions*, *supra*; *Justak Bros. & Co. v. NLRB*, 664 F.2d 1074 (7th Cir. 1981), *enfg.* 253 NLRB 1054 (1981). See also *NLRB v. Adam & Eve Cosmetics*, 567 F.2d 723 (7th Cir. 1977), *revg.* 218 NLRB 1317 (1975). See also *F. Mullins Construction*, 273 NLRB 1016, 1020 (1984).

⁵ *Dresser Industries v. NLRB*, 654 F.2d 944 (4th Cir. 1981), *enfg.* as modified 248 NLRB 33 (1980).

⁶ Jay Sullivan, Jeffrey McDaniel, Dennis Ferris, Chris Hill, and Charles Booe.

Davis affirmed that he had a conversation with Terry Christie on July 14, about a week after Davis was hired. Christie said that the Company was bringing up employees from South Carolina to man the job. Davis replied that there were qualified people in the area, and asked why the Company would go to the expense of bringing others in from the south. Christie replied that the individuals in the area were “IBEW.” Davis responded that they were qualified electricians, but Christie stated that Superintendent Mastalz would not have any union employees on the job. Jeffrey McDaniel gave similar testimony. The complaint alleges that Christie’s statements violated Section 8(a)(1) of the Act.⁷

Douglas Summers testified that on July 18, Christie asked him whether Davis had been saying anything to him about the Union. Christie added that he knew that “damn Greg is Union,” and that he, Christie, was going to “find out.” The complaint alleges that these statements constituted unlawful interrogation, and created an impression of surveillance of its employees’ union activities.⁸

An incident happened on July 23 which led to Davis’ alleged discharge. According to Davis, he was near Charles Booe, and wrote on a note pad that Booe was not wearing a hard hat. Booe said that he had not been provided with one. Christie approached and asked: “You ain’t talking about that Union mess too, are you?” Davis replied that he was, and had a right to do so if Christie could talk about fishing and girls. Christie then said: “You’re fired.” Davis replied that Christie had just been considering making him a foreman, and asked why he was being fired. Christie replied, “For being Union.” The complaint alleges this statement as an independent violation.⁹ Christie added, “Get your tools and get out of here.” Booe was nearby, and told Davis that he had been fired.

Christie and Jay Green, a witness for Respondent, gave internally contradictory testimony. However, both testified—Christie on cross-examination and Green on direct examination—that Christie told Davis to get his tools and leave the job. Christie denied making the statements attributed to him above.

Superintendent Mastalz testified that Davis left the building where he had been working, and told Mastalz that he had been fired. He was “hysterical” according to Mastalz, and the superintendent told him to get off the jobsite. Davis did so, and never returned. Mastalz did not call him.

Mastalz and Christie had a conversation a few minutes later. Christie told the superintendent that Davis had been soliciting for the Union, and that Christie told him to get off the job. According to Mastalz, Christie “recommended” that Davis “be fired.”

Employee Tony Heath testified that, on the same day, Christie gave him a “high five” and said that he had fired that “son-of-a-bitch.” “What son-of-bitch?” Heath inquired. Christie replied that it was Greg Davis, and Heath asked the reason. “For talking about Union activities on the job,” Christie responded. Christie denied this conversation.

Mastalz testified that he called company official, Morris Mason, about Davis, and that the latter recommended that Davis be reprimanded rather than discharged.

⁷ G.C. Exh. 1(z), par. 9(a).

⁸ G.C. Exh. 1(z), pars. 9(c), (g).

⁹ G.C. Exh. 1(z), par. 9(e).

B. Factual and Legal Conclusions

I credit Davis' version of the July 23 conversation, partially corroborated by Booe, Christie, and Green. It is uncontradicted, as stated by Superintendent Mastalz, that Davis came out of the building and told Mastalz that he had been fired. As Mastalz admitted, he told Davis to get off the jobsite, because he was "hysterical." Christie then told Mastalz that Davis had been soliciting for the Union, and that Christie told him to get off the job.

At the hearing, Respondent's witnesses contended that Davis had not been fired, but had quit. In its brief, the Company argues that Christie did not fire Davis, but simply asked him to leave the jobsite.¹⁰ This is inaccurate. Christie, a supervisor, told Davis that he was "fired for being Union," and to get his tools and leave the job. When Davis told Mastalz that he had been fired, the superintendent did not question the matter, but told him to get off the job.

Respondent argues that Davis was told to get off the job because he was "hysterical," not because of union activities. However, Supervisor Christie told Davis that he was fired immediately after Davis told him that he was soliciting for the Union. There is no evidence that this part of the conversation was other than ordinary in nature. Although Davis may have become disturbed after being fired, it was the discharge which took place first. Christie told Davis that he was fired for "being Union." Respondent's argument has no merit. The asserted telephone colloquy between Mastalz and Mason is mere window dressing.

The Company also argues that Davis "kept quiet" about his union affiliation, was working "pursuant to a salting agreement," and was "waiting to bring charges against the Company."¹¹ This argument has even less merit than the contention that Davis quit. Davis testified that he was unemployed when he applied for work, that the job was one-quarter mile from his house, and that he had to feed his family. This was his primary purpose in applying for work. Davis agreed that one of his functions was to take notes on company actions which were arguably unlawful, and report to the Union. He denied being paid by the Union, and testified that it was "unheard of" that he could be pulled off the job by the Union. Davis was an exemplary employee who was considered by his employer for promotion to foreman, until he engaged in union activities. He was then fired by a supervisor for "being Union."

Under *Wright Line*,¹² the General Counsel has the burden of establishing a prima facie case that is sufficient to support an inference that protected conduct was a motivating factor in an employer's decision to discipline an employee. Once this has been established, the burden shifts to Respondent to demonstrate that the discipline would have been administered even in the absence of the protected conduct. The General Counsel has presented a strong prima facie case that Davis was discriminatorily discharged. Respondent has not rebutted

it. Accordingly, I conclude, Respondent violated Section 8(a)(3) and (1) of the Act.

I credit the consistent testimony of the General Counsel's witnesses as to statements made by Christie, listed above, and alleged to be violative of the Act. I conclude that, by each of them, Respondent violated Section 8(a)(1) of the Act.

Douglas Summers testified that, on his first day on the job, Charles Garcia told him that the latter had been hired as foreman to help Mastalz "because they were trying, you know, the Union was real big in Winston-Salem and he wanted (me) to help look over his shoulder." This testimony is uncontradicted, and the complaint alleges that it violated Section 8(a)(1) (G.C. Exh. 1(x), par. 9(b)). I agree and so find.

IV. THE ALLEGED UNLAWFUL REFUSAL TO HIRE APPLICANTS AT WINSTON-SALEM

A. The Company's Actions on Applications for Employment

The complaint alleges that Respondent discriminatorily failed to consider or hire various applicants for employment from March 1 through August 11, at both jobsites. In this section, I consider the factual issues at Winston-Salem, and reserve legal discussion until the North Charleston applications have been considered. The complaint also alleges that Superintendent Mastalz made unlawful statements.

Mastalz testified that he hired about 19 electricians between April 4 and August 2, and still needed help. The Company brought in employees from South Carolina to work on the Winston-Salem job. Mastalz told Davis that he would hire as many electricians as Davis could find if they were as good as Davis. The latter recommended several, and Mastalz hired them.

Several of the persons hired were union members, including Davis. However, there is no evidence that the Company knew this. Business Manager Gary Maurice advised members not to disclose their union affiliation if they wanted work. There is no evidence that union affiliation was discussed at the time of hire or that the applicants wore union insignia. There was no indication of such affiliation on the applications.¹³

From March 30 through August 11, the Company received 16 applications for employment from applicants who indicated their union affiliation in various ways—by stating on the applications that they were union organizers, that they had been referred by the Union, by wearing union insignia, or by frank disclosure. All were experienced electricians, and the Company does not contest their qualifications, with two exceptions noted below.

None of these individuals was hired.¹⁴ The Company gave various reasons—the application was not received, the applicant was hired but failed to report for work, the applicant refused to take a drug test, or, simply, there was no work available.

¹⁰ R. Br. 55-57.

¹¹ Id. See discussion of the Company's "salting agreement" argument, *infra*.

¹² 215 NLRB 1083 (1980), *enfd.* 662 F.2d 889 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 464 U.S. 393 (1983).

¹³ G.C. Exhs. 2-4, 6-8, 13, and 40-47.

¹⁴ Possible exceptions Stephen Pope and Waco Cottingham are discussed below.

B. The March 30 Applications

Human Resources Director Morris Mason testified that the Company had a contract with an employment agency, Southern Personnel, to provide employees for the Company. Union Business Manager Gary Maurice and seven other applicants¹⁵ applied for jobs at Southern Personnel on March 30. There were two ladies in the office, who said that they were “hiring for the Company.”¹⁶ Their names were “Beth” and “Pat.” They informed the applicants that the Company would hire 10 employees immediately, and 30 to 35 later. Further, the ladies told them that the Company would notify the applicants selected for employment.

The complaint alleges that Patricia Kirchman, of Southern Personnel Services, was an agent of Respondent. I need not decide whether the “Pat” referred to by Samuels was Patricia Kirchman. The two ladies informed the applicants that they were hiring for Respondent, and the fact that Southern Personnel Services was under contract with Respondent to provide personnel is undisputed. I conclude that the representatives in the Southern Personnel office were agents of Respondent. *Phillips Industries*, 172 NLRB 2119, 2123 (1968), and *Rapid Mfg. Co.*, 239 NLRB 465, 472 (1978).

None of the applicants received any communication from the Company for the next 4 months.¹⁷

C. The Individual Applications

1. Larry Morgan and Kim Farley

Superintendent Mastalz claimed that he never saw the applications of Morgan or Farley.¹⁸ However, Mastalz admitted that Southern Personnel communicated with the Company’s project manager, and that one of the applications¹⁹ was from Southern Personnel. Morgan’s and Farley’s are in evidence. I conclude that the applicants filed them with Southern Personnel, and that the latter forwarded them to Respondent. Both applications show union affiliation.

Respondent sought to establish that the applicants at Winston-Salem were not bonafide applicants for employment. On cross-examination, Morgan agreed that he had spent some time attempting to organize employees, but denied that he ever received any compensation from the Union. He denied that he was “instructed” by the Union to take the job in order to organize the employees, and denied that he was subject to being called off the job by the Union and told to take another job. Asked to define a “salting agreement,” Morgan answered that it was an agreement to attempt to organize the employees of nonunion contractors. Morgan said that he applied for the job because he was out of work, he knew the job, and it was close to where he lived.

Farley on cross-examination testified that Business Agent Maurice told him that there would be work available at the jobsite, and that Maurice would like to have union members employed there. Farley agreed that his employment was pursuant to a “salting agreement.” Asked to define the latter,

¹⁵ Kim Farley, Larry Morgan, Paul Vogler, Patrick Parsons, Mack Good, Allen Samuels, and Randy Penn.

¹⁶ Testimony of Allen Samuels.

¹⁷ The Company sent letters to applicants in August, which are discussed hereinafter.

¹⁸ G.C. Exhs. 5, 9.

¹⁹ G.C. Exh. 40.

he replied, “I try to talk to the Company and see if they’re interested in using Union labor.”

2. Stanley Thompson

Stanley Thompson applied at the jobsite on April 2. He is one of the applicants whose qualifications were questioned by Mastalz. Thompson had 15 to 16 years’ experience as a journeyman electrician. He submitted an application showing employment as an electrician with three different employers, including a period of 5 years with one of them. His last job ended in January 1994, after about 6 months of employment. Thereafter he worked 3 days as a “flag man.”²⁰

The application states that he left his last employment because it was a union job and he refused to join. However, Thompson was a union member at the time of these events, and last paid union dues in June 30. Thompson stated that he wore a union cap “through 1994,” but did not wear a union button when he talked with Mastalz on April 2. The superintendent, then told Thompson that he would have work in 2 weeks, and advised him to come back.

Thompson returned on April 18. On this occasion he was wearing two union buttons on his jacket. Mastalz told him that he did not “have anything” at the time. I credit Thompson’s uncontradicted testimony.

Thompson also testified that he was in the process of moving to an address different from the one indicated on his application. He affirmed that Mastalz kept a legal pad with the signatures of applicants. On this pad, according to Thompson, he indicated the change from the old address to the new address.

On April 4, 2 days after Thompson’s initial visit to the jobsite, Mastalz hired Douglas Summers, who did not reveal his union affiliation. On April 12, 8 days’ later, Mastalz hired Terry Christie (as an electrician). I do not credit Mastalz’ testimony that he had “nothing available” when Thompson applied.

The evidence is unclear as to whether Thompson wore union insignia, such as a hat, on his first visit. However, his testimony that he wore two union buttons on his April 18 visit is uncontradicted. Mastalz denied knowledge of Thompson’s union sympathies. I find that Mastalz did know, from the union buttons, that Thompson at least favored the Union.

Mastalz denied any correction in Thompson’s address, testimony which I do not credit.

The superintendent testified that Thompson was a “flagman,” not an “electrician.” This statement is contrary to the documentary evidence available to Mastalz on the application, about which he had two opportunities to question Thompson.

3. Randy Penn and Michael Thompson

Randy Penn left Southern Personnel on March 30 before completing his application, because of a medical appointment. He returned, but could not find anybody. Penn then went to the jobsite and submitted his application to Superintendent Mastalz. He informed the superintendent that he was a union member. Mastalz promised him a job, but never made a specific offer at a definite wage rate. He told Penn to come back in 2 weeks.

²⁰ G.C. Exh. 17.

On April 12, Penn and Michael Thompson, who had not applied at Southern Personnel, went to the jobsite and talked with Mastalz. The superintendent recognized Penn but said he could not hire him "direct." He did not need anybody. However, he could hire Thompson "direct."

Thompson corroborated Penn—Mastalz did not specify wage rates and said that he could not hire Penn "direct" because he had applied at a temporary service. However, he could hire Thompson, and gave him an application. He said that he would get back with Thompson. The latter filled out the application and returned to the jobsite the next day, April 13. Mastalz saw him, and told him to turn in the application at the trailer. Thompson did so.

Mastalz agreed that Penn came to see him about the end of March. He knew that Penn was affiliated with the Union. The superintendent denied that Penn asked about the wage rate or the hours. Instead, he told Penn that the rate was \$9.50, and told him to fill out an employment package and report for work the following Monday. Penn accepted the job, but did not report for work. When he came back on April 12, Mastalz asked him where he had been, and where his "paperwork" was. Mastalz had no documentary evidence that Penn had been hired.

With respect to Michael Thompson, Mastalz claimed that he never submitted an application.

It is unlikely that Penn would have failed to report for work if Mastalz had offered him a job which he accepted. The fact that Penn did report back 2 weeks' later is consistent with his testimony that Mastalz told him to do so.

With respect to Thompson, Mastalz stated that he was not hiring anybody at the time. Nonetheless, he gave Thompson an application to submit. According to Mastalz, Thompson never did so. Yet the application is in evidence,²¹ and the factual issue is whether Thompson completed it, and held onto it for almost a year before giving it to the General Counsel—or submitted it to the Company on April 13, as he testified.

Mastalz hired Terry Christie on April 12, and there is no question that the Company needed electricians at the time of these events. Mastalz' testimony is replete with contradictions, and I credit the testimony of Penn and Thompson. The former was never offered a job, and Thompson received no reply to the application which he filed on April 13.

4. Gary Maurice

Gary Maurice also went to the jobsite on April 12, after filing his application with Southern Personnel on March 30. Maurice was one of the applicants whose qualifications as an electrician were questioned by Mastalz.

Maurice had academic training in electrical work. He is a journeyman with 21 years of experience. In 1988, he became the business manager of Local 342, a paid position. He continued to put in "hundreds of hours" in electrical work, engaged in charity work, and assisted contractors in supervising their electricians. He taught continuing education courses to contractors in order to assist them in retaining their licenses. He also worked for contractors, a practice which he said was customary among business agents.

On April 12, Maurice submitted an application showing work as an electrician from 1983 to 1986, interspersed with

some organizing work, followed by his appointment as business manager in 1988.²²

Maurice introduced himself to Mastalz, and told him that he had already applied at Southern Personnel. The superintendent replied that he could not hire Maurice "directly" because of the prior application. Southern Personnel would call Maurice as soon as Mastalz told the agency how many electricians he needed.

Mastalz told Maurice that he needed helpers, not electricians. On the same day, April 12, he hired Terry Christie as an electrician.

Mastalz contended that Maurice had not worked with his tools for 8 years. However, on cross-examination, Mastalz conceded that Maurice had worked "some" with his tools, that he was a licensed journeyman, that he had taught electricians' courses requiring him to meet standards established by the state, and that as a journeyman he had to be certified periodically and keep up with the latest developments.

I conclude that Maurice was a qualified electrician and that Mastalz knew it. Respondent did not offer him a job.

Maurice denied that the Union had a "salting agreement." It did conduct courses in how to organize employees. Maurice agreed that his primary purpose was to organize the Company's employees. However, he affirmed, monetary considerations were also a factor. He testified that work with Respondent would have been his "primary" job, and that he would have performed his Union duties during "off-hours." Asked whether he would have been moonlighting at Eldeco, Maurice denied it, and said that he would have been moonlighting at his union job. Asked whether he would have left his job with Respondent if the employees had become organized, Maurice replied that he could not speculate that far in the future.

5. Russell Hawks and Daniel Vella, June 1 and 22

Russell Hawks applied on June 1. In addition to evidence of union affiliation on his application,²³ he wore a union hat, shirt, and had a union decal on his automobile.

Hawks came back on June 6, and Mastalz told him that he could not find Hawks' application. Hawks returned on June 8, but Mastalz still could not find his application. Hawks told Mastalz that he was a union man and would try to organize the shop, but that he was there for work. Mastalz replied that he had nothing against Union electricians, but that the Company "frowned against unions altogether."

Mastalz told Hawks not to return, and that he would call Hawks. The latter heard, however, that the Company was hiring, and returned to the jobsite on June 22. Mastalz told him that he was still not in a position to hire.

On his last visit, Hawks submitted the application of Daniel Vella, at the request of business agent Maurice. The application shows that Vella had received technical training in fiber optics, controls, and cable splicing. He had extensive experience as a journeyman electrician, including prior work for the Company. The application also disclosed that he was referred by the Union. On the back of the application is the legend "received Eldeco, 2 pages."²⁴

²² G.C. Exh. 22.

²³ G.C. Exh. 19.

²⁴ G.C. Exh. 20.

²¹ G.C. Exh. 18.

Mastalz agreed that Hawks applied. He contended that he told Hawks to check back with him, and that Hawks did so. Mastalz then told Hawks that he could hire him the following week, but Hawks did not return.

Mastalz testified that he knew that Hawks supported the Union, but he denied saying that the Company frowned on unions.

Mastalz agreed that he hired Charlie Carter on June 20, and Tony Heath in the last week of June. This is consistent with Hawks' testimony that he heard that the Company was hiring, and went back to Mastalz on June 22. I credit Hawks' testimony that he applied on June 1, and returned to the job-site on June 6, 8, and 22.

Hawks' description of his discussion about the Union with Mastalz on June 8 is detailed in nature, whereas the superintendent's denial is perfunctory. Hawks was the more truthful witness, and I credit his testimony that Mastalz told him that the Company frowned on unions. The complaint alleges that, on about this date, Mastalz threatened employees with unspecified reprisals for engaging in union activities.²⁵ The allegation has merit, and I find that Respondent thereby violated Section 8(a)(1) of the Act.

I also credit Hawks' testimony that he submitted Daniel Vella's application on June 22.

6. Paul Vogler, Patrick Parsons, Mack Good, and Kenneth Hanks

On June 9, Vogler, Parsons, Good, and Hanks submitted applications at the jobsite. Vogler, Good, and Parsons had applied on March 30 with Southern Personnel. All four applications showed union affiliation,²⁶ and all the applicants wore union insignia.

According to Vogler and Parsons, Mastalz told them that work had slowed down, and that there was no work available. Mack Good stated that he applied on June 9 with Vogler, Parsons, and Hanks. Kenneth Hanks corroborated the testimony of the other three applicants.

Mastalz agreed that he said work had slowed down. He also conceded that he hired Philip Mappa in late May, and Charlie Carter and Tony Heath in late June. According to Mastalz' testimony, he had only four electricians by June 9.²⁷

Vogler's application states that his reason for leaving his last job was to organize the Company's employees.²⁸ He denied that this was his "primary" purpose, but was one of his purposes. Vogler was making \$13.75 hourly with another employer at the time of his application. Asked on cross-examination why he would take a \$10 hourly job with Respondent, Vogler replied that his existing job required him to drive 150 miles daily, while the K-Mart job was 11 miles from his residence.

Also on cross-examination, Vogler stated that there was a "salting agreement." Asked to define this term, Vogler replied that it was an arrangement permitting union members to work for nonunion employers. Vogler also testified that there was an "understanding" that he might be required to work for another employer if Respondent's employees be-

came organized. On redirect examination, however, Vogler testified that nobody from the Union told him that he was subject to being required to go elsewhere if the Union organized the Company's employees. Vogler's testimony on redirect examination is consistent with the other evidence in the case, and I accept it as his position on this issue.

Parsons also stated that there was a "salting agreement," which he defined as attempting to organize the employees of a nonunion employer. He denied that the Union could "force" him to quit a job and take another once his current employer was organized. He was not paid anything for organizational work.

Parsons was working for the same employer as Vogler when he applied, at \$13.75 hourly. Asked why he would have worked for Respondent at \$10 to \$12 hourly (Parsons' estimate), he replied that he was driving 140 miles roundtrip to his existing job, and wanted to be closer to home.

Mack Good's application states that he left his last employer "to organize union labor."²⁹ Business Agent Maurice generally suggests places for him to work. Maurice suggested that he try to organize Respondent's employees.

Good said that he had taken a 1-day course in organizing. He was working for the same employer as Vogler and Parsons, and had to travel 200 miles daily to work.

7. John Compton, July 13

John Compton applied on July 13. His application showed that he had been referred by the Union.³⁰ Compton wore a union shirt, and told Mastalz that he would try to organize the employees. Mastalz "grunted." The superintendent told him that he would call him, but did not do so.

Mastalz also testified that he hired five electricians on July 6 and 7, and more later in the month.

8. Allen Samuels, July 14

Allen Samuels was one of the applicants in the group that applied at Southern Personnel on March 30. He went to the jobsite on July 14. His application states that he was a union organizer,³¹ and he wore a union hat. Mastalz told him that he had no need for electricians at that time.

V. THE STRIKE AND THE DRUG-TESTING PROGRAM— STATEMENTS BY MASTALZ

A. *The Strike and the New Program*

The complaint alleges that Respondent promulgated and disparately enforced a drug-testing policy on August 3 for the purpose of discouraging union activity.

As described above, Respondent unlawfully discharged Gregory Davis on July 23. The Union then called a strike, and intermittently picketed the jobsite for an undetermined number of days. Superintendent Mastalz stated that he had a severe need for employees after the strike. There is no evidence that all employees went out on strike.

Prior to the strike, applicants were told that the Company had a substance abuse policy, and employees had to sign acknowledgment of this. However, they were simultaneously told, most of them by Mastalz, not to worry about it, and

²⁵ G.C. Exh. 1(z), par. 9(d).

²⁶ G.C. Exhs. 10, 11, 14, and 16.

²⁷ Douglas Summers, Terry Christie, Chris Hill, and Philip Mappa.

²⁸ G.C. Exh. 10.

²⁹ G.C. Exh. 16.

³⁰ G.C. Exh. 12.

³¹ G.C. Exh. 15.

that there would be no drug tests. In fact, there were none prior to the strike.

Morris Mason was the Company's safety director. He decided to make a safety inspection of the Winston-Salem jobsite in the latter part of July or the first part of August. This was his first inspection of this jobsite. According to Mason, he tried to make an inspection in the "midpoint" of a job, when the "danger" is greatest.

According to Mason, he and Mastalz inspected the job and those of contractors that might affect the Company's employees. He received "indications" that employees of other contractors were "smoking a joint" during breaks. Mason said that he interviewed Respondent's employees, and none of them said that they had a substance abuse problem. Mastalz told Mason that he was "comfortable" with his employees.

Based on these factors, and the imminence of new employees, Mason decided to implement drug testing for new employees only. He noted the cost of drug testing—\$50 per individual.

The Union filed the initial charge on July 27.³² On August 3, Mason sent letters to applicants reading:

Eldeco, Inc. has work available for you at the K-mart location in Winston-Salem. If you are interested, please contact Norman Mastalz at the jobsite to arrange for a drug test and to work out details of wages and hours.³³

On August 9, Business Manager Maurice faxed the following to Mason:

Please be advised that a number of our members, who are also applicants for employment with your firm, as well as alleged discriminatees in a current NLRB proceeding against your firm, have recently received correspondence from you regarding possible employment. I would like to question the conditions for employment that you place on the known union applicants that have not been required of the other employees. . . . In particular, I am requesting a reply from you regarding the drug test, and would further advise you that an additional condition for employment required of only the known union applicants is a blatant violation of employees' Section 7 rights.³⁴

Mason replied on the same date:

My job . . . is the safety of Eldeco employees. During routine safety inspection . . . last week, I discovered that our drug testing was not being done. I advised our Superintendent Norman Mastalz to locate a clinic and to begin the tests as soon as procedures were worked out. I anticipated this process starting immediately. Incidentally, the notification your members received was a form letter used any time we need to notify a signifi-

cant number of former employees or new applicants that an employment opportunity exists.³⁵

Several of the applicants testified about the Company's August 3 letter. None responded to it. Kenneth Hanks said that it was a "ploy" to keep the union members out. Russell Hawks stated that it was discriminatory. Other employees characterized the letter as an offer to take a drug test, not an offer of employment. Mack Good did not respond because the Company failed to hire any of the applicants who applied on March 30, after the employment agency told them that 10 would be hired immediately. Some of the applicants had obtained other jobs.

B. Alleged Unlawful Statements by Superintendent Mastalz—Implementation of the Drug Testing Program

1. Summary of the evidence

Tony Heath testified that Mark Luper was hired on Heath's recommendation, and was Heath's helper. In August, Luper told Heath that he was concerned about taking the drug test. Heath and Luper then went to Mastalz and Christie, and expressed Luper's concern. Mastalz replied that they should not worry, because the drug test was intended to get rid of union supporters.

The complaint alleges that Christie rather than Mastalz threatened to discharge union supporters by implementing a drug testing program.³⁶ However, Mastalz denied making the statement. Accordingly, the allegation was fully litigated.

Heath testified that Luper failed the test, but was still working at least 6 weeks' later. Mason agreed that Luper failed the first test, which was administered in mid-August, but was allowed to work for more than 2 months until October 21, when he passed a second test.³⁷

Heath testified about a conversation with Mastalz about a week after the strike. Mastalz said that the Union was trying to infiltrate the job, and that he himself had hired some of them. The superintendent waved five or six applications in front of Heath, and said that he was not going to have any union men on the job. The complaint, as amended at the hearing, alleges that these statements were violative of the Act. Mastalz denied making the statements. I credit Heath, and conclude that Respondent hereby violated Section 8(a)(1).

Heath affirmed that he was not in fact a member of the Union. In the fall, he left the job to go bow hunting. After a week of this, Mastalz called and asked him to come back to fix some cash registers. Heath agreed to do this, did so, and then left again. Mastalz, on the other hand, contended that he let Heath go because of "poor workmanship," then called him back to correct some mistakes he had made on the cash registers. Heath contended that the "rework" which he did involved mistakes of other employees. He had never been reprimanded, according to Heath.

On cross-examination, Heath, over the General Counsel's objection, testified that he made the following pretrial statement to the Board. "Mark (Luper) smokes pot regularly as

³² G.C. Exh. 1(f).

³³ G.C. Exh. 23; R. Exhs. 1, 3-6, 8-12. The recipients of the letters included Larry Morgan and Kim Farley, R. Exhs. 1 and 3, whose applications Mastalz denied seeing. The Company also sent a letter to Daniel Vella, R. Exh. 20, whose application was submitted by Russell Hawks.

³⁴ G.C. Exh. 24.

³⁵ G.C. Exh. 25.

³⁶ G.C. Exh. 1(z), par. 9(i).

³⁷ R. Exh. 18.

do I, and he was nervous about the test.” The General Counsel moved to strike the question and answer.

2. Factual and legal conclusions

Respondent seeks to impugn Heath’s credibility, first, because he admitted smoking marijuana. Respondent argues that Heath thereby admitted violating the law, and that this detracts from his credibility.

Respondent’s argument is not supported by the Federal Rules of Evidence, which provide that a witness’ credibility may be affected by a conviction (not admission) of certain crimes, and that these must be punishable by death or imprisonment in excess of 1 year, or involve dishonesty or false statement.³⁸ There is no evidence that Heath was ever convicted of smoking marijuana, much less that the requirements of Rule 609 were met.

I deny the General Counsel’s motion to strike the testimony about Heath’s smoking marijuana. However, this does not affect his credibility, absent evidence that he was smoking at the time Mastalz made the asserted statement, and that his ability to hear and recall was impaired. There is no such evidence.

Respondent next argues that Heath was biased because Mastalz “let him go” and then called him back to repair mistakes he had made. I do not credit Mastalz’ testimony. There is no documentary evidence that the Company ever reprimanded Heath, much less discharged him. Heath testified without contradiction that he socialized with Supervisor Christie after leaving the Company. I accept his version of these events.

Respondent further argues: “There was absolutely no evidence that union applicants were tested any differently than non-union applicants. There was no evidence that drug testing impacts union applicants more significantly than non-union applicants.”³⁹

The fact remains that, after the strike, the Company excused existing employees from being tested, while it insisted on testing the applicants. The latter supported the Union, while Respondent had reason to believe that the nonstriking existing employees supported the Company. That the testing may have been administered uniformly to new applicants does not blur the fact that the program was applied disparately to known union supporters who had already applied, while company supporters were excused. This disparity establishes that the program was discriminatorily administered.

Other evidence supports this conclusion. The timing of Mason’s visit to the jobsite, immediately after the strike, suggests that the visit was motivated, in part at least, by the strike. Mason’s reasons for excusing the remaining employees—they assured him that they were not smoking marijuana, while Mastalz felt “comfortable” with them—are not persuasive. Mason’s statement about the \$50-per-test cost of drug testing as a reason for not testing existing employees is difficult to understand, given the size of the job, the amount of money undoubtedly involved, and Mason’s asserted fear of “danger” on the jobsite. The fact that Luper was allowed to work for 2 months after failing a drug test casts further doubt on the bona fides of the program. Finally,

I credit Heath’s testimony that Mastalz said the purpose of the program was to get rid of union supporters.

I conclude, as alleged, that the drug-testing program was administered disparately in order to discourage union activity and violated Section 8(a)(1) of the Act.⁴⁰

I credit Heath’s testimony that Mastalz told Heath and Luper that the purpose of the drug-testing program was to “get rid” of union supporters. Thus constituted a threat to discharge union supporters as alleged in the complaint, and was unlawful.

I further credit Heath’s testimony that, about a week after the strike, Mastalz waved some applications in front of Heath and said that he would not have any union men on the job. This statement violated Section 8(a)(1).

C. Stephen Pope and Waco Cottingham

Stephen Pope was a union member. He testified that he was hired by a temporary service, Labor Finders, to work at the Winston-Salem jobsite. Nothing was said about taking a drug test. Pope went to the jobsite on August 8, wearing a union T-shirt. He told Mastalz that he was a union member. Mastalz asked him whether he knew there was a strike, and Pope replied that he wanted to work anyway. He reported for work the next day, August 9, and worked 2 days. At the end of the second day Mastalz told him that the fees of the temporary service were too high, but that he would be willing to hire Pope directly. However, Pope would have to take a drug test. Pope asked whether any of the employees then employed at the jobsite had taken the test, and Mastalz replied that they had not been required to do so. Pope asked whether they would have to take a test in the future, and again received a negative answer. Pope refused to take the test, and was discharged.

Waco Cottingham was not a union member. He applied at the jobsite on August 9. There was nothing on his application to indicate that he supported the Union,⁴¹ and he did not wear any union insignia. Mastalz looked over his application and hired him immediately.

Cottingham signed the standard form acknowledging that the Company had a substance abuse policy and that he might have to take a test in the future.⁴² Cottingham did not read it, and there was no discussion of drug testing.

On August 10, Cottingham ate lunch with Pope, who was wearing a union T-shirt and cap. Mastalz and another supervisor saw them together. Cottingham continued to work for about a half-day on August 11. Mastalz then told him that he had to take a drug test. Cottingham refused, and Mastalz discharged him for that reason.

VI. THE ALLEGED DISCRIMINATION AT NORTH CHARLESTON

A. Respondent’s Jobs in the Charleston Area

The complaint alleges that Respondent discriminatorily refused to offer jobs to nine applicants at its North Charleston, South Carolina jobsite.⁴³ The Company’s branch office was located in North Charleston, and it had several jobs in the

³⁸ Fed.R.Evid. 609.

³⁹ R. Br. 15.

⁴⁰ G.C. Exh. 1(z), pars. 9(h) and 15.

⁴¹ G.C. Exh. 13.

⁴² R. Exh. 7.

⁴³ G.C. Exh. 1(zz), par. 10.

Charleston area—in the language of General Superintendent Edward Ball,⁴⁴ at “Cross,” “Orangeburg,” “Myrtle Beach,” and at a new K-Mart store.

The K-Mart job started in March, according to Ball, and was finished in October. There were 35 to 40 employees there at one time or another. Ball testified that he hired a helper on March 14, and by the week of March 25 had two or three electricians at the jobsite. The latter were transfers from other jobs. Ball also testified that he hired new electricians, or rehired former employees, whom he identified.⁴⁵ Ball said that there were others whom he could not recall. He averred that most of the electricians were hired “toward June, July, August,” but agreed that he had more than three electricians at the K-Mart jobsite “before May.”

B. The Applications at the North Charleston Office—the Supervisory Status of Chris Momeir and Judy Bardsley

1. The group applications

a. The supervisory issue

On March 1, eight individuals applied together for employment at Respondent’s North Charleston office.⁴⁶ All except one, Thomas Flood Jr., applied for jobs as electricians. None of the applications specified a particular jobsite.⁴⁷

Thomas Flood Jr. applied for a job as an apprentice. He testified that he was a high school student at the time of his application, and could have accepted only a part-time job. However, Flood averred, he graduated in May.

Thomas Flood Sr. was selected as spokesman for the applicants, and had conversations with alleged Supervisors Chris Momeir and Judy Bardsley.

Richard Zeron, manager of Respondent’s North Charleston branch, and an admitted supervisor, testified that Momeir was director of operations and, that he was in charge of the Company’s estimating facilities. He hires estimators, and “oversees a few jobs in the Columbia area.” According to Zeron, Judy Bardsley was the Company’s purchasing agent at North Charleston, worked in the office, and hired and fired office personnel.

The complaint alleges that Momeir and Bardsley were supervisors and agents.⁴⁸ Respondent’s answer asserts that Momeir and Bardsley were “administrative office personnel,” but says nothing about their representative status. In a separate section the answer states that all allegations are denied unless specifically admitted.⁴⁹

The complaint does not allege unlawful statements or actions by Momeir or Bardsley. However, the issue remains as to whether their statements and knowledge of the applicants may be attributed to Respondent. On the basis of their authority to hire and fire, I conclude that they were supervisors and agents of Respondent

b. The group applications

The eight applicants on March 1, had previously obtained application forms, and had filled them out. Thomas Flood Sr., the spokesman, first spoke with a receptionist, and then with Bardsley and Momeir. He announced that the group was from the IBEW.⁵⁰ At least three of the applicants wore union insignia.⁵¹ Four of the applications indicated union affiliation⁵² while three of them indicated as prior employers companies which recognized unions.⁵³

During the March 1 visit, Chris Momeir told the applicants to return the following Friday, March 4, and talk to General Superintendent Edward P. Ball. All of the March 1 applicants except James Michi⁵⁴ returned on March 4. Ball was not there. According to David Smith, whom I credit, Superintendent George Kelly, an admitted supervisor, told the group on March 4, that the Company expected to hire 20 employees. He mentioned other jobs coming up, including the one in Winston-Salem. The applicants were notified that they would be “contacted,” and that all hiring would be done at the jobsite after that. General Superintendent Ball testified that he knew that the group that came with Flood were “Union men.” He also acknowledged that all were qualified electricians.⁵⁵

2. The individual applications and visits to the jobsite

a. Douglas Michi Jr. and James Anderson

As indicated, Michi and Anderson applied with the group of applicants on March 1, and returned on March 4. On March 25, Michi went to the jobsite, where he spoke with Supervisor George Kelly. The latter told Michi that he needed employees, but first had to check with General Superintendent Ball. Kelly asked Michi to return in a few weeks. I credit Michi’s uncontradicted testimony.

Michi and Anderson went to the jobsite on April 5, and again spoke with Kelly. The latter said that he would have to check with General Superintendent Ball about filling out an application. Michi replied that he had already done so. Kelly made an appointment with the employees at 9 a.m. the next day.

Michi went to the office the next morning, but Kelly was not there. Michi then went to the jobsite, where Kelly informed him that Ball did not have his application. Michi agreed to fill out another application. He did so, and attached a resume. The application showed that his last job had been as a “union electrician,” while the resume listed his experience and expertise, and at least one prior employer whose employees had been organized by a union.⁵⁶

⁴⁴ The pleadings establish that Edward Ball was a supervisor and an agent of Respondent.

⁴⁵ Samuel Grimsley, Steve Barium, Keith Greenhill, Earnest Deary, and Scott Warheit.

⁴⁶ Thomas Flood Sr., Thomas Flood Jr., Douglas Michi, James Michi, Sean Taylor, Vernon Taylor, David Smith, and James Anderson.

⁴⁷ G.C. Exhs. 26–27, 31–34, and 36.

⁴⁸ G.C. Exh. z, par. 7.

⁴⁹ G.C. Exh. 1(bb), par. 18.

⁵⁰ Vernon Taylor testified that Thomas Flood Sr. and Douglas Michi used the word “we” in discussing the reason for the visit.

⁵¹ David Smith, Sean Taylor, and Vernon Taylor.

⁵² Thomas Flood Sr., G.C. Exh. 20; Thomas Flood Jr., G.C. Exh. 31; Sean Taylor, G.C. Exh. 32—referred by David Cockcroft, a union business agent; and Douglas Michi, G.C. Exhs. 36 and 37.

⁵³ David Smith, G.C. Exh. 26; Vernon Taylor, G.C. Exh. 33; and James Anderson, G.C. Exh. 34.

⁵⁴ James Michi is not alleged as a discriminatee in this proceeding.

⁵⁵ It is not clear whether this would apply to Thomas Flood Jr.

⁵⁶ G.C. Exhs. 36 and 37.

b. *John C. Frazier*

Frazier went to the Company's office on March 1, but was not with the group that applied on the same day. A secretary was present, and Frazier filled out an application. It lists as prior employers five different companies whose employees were organized by a union, including the Bechtel Company at Savannah River.⁵⁷ The secretary said that they would be hiring about 10 employees in 2 weeks.

Frazier returned on April 1, and the secretary again told him that the Company would be hiring 10 employees within 2 weeks. The Company stipulated that Frazier was a qualified electrician. He was a union member.

c. *Joel Yon Jr.*

Joel Yon Jr. went to the Company's office on April 15, saw a secretary, and submitted an application which listed five former employers, all of whose employees were represented by a union. Four were located in the Charleston area, and the fifth was the well-known Bechtel Company.⁵⁸ Yon was a union member, and was well qualified as a journeyman electrician. General Superintendent Ball admitted that he knew that one of Yon's former employers (I. B. Abel) employed union electricians.

d. *Thomas Flood Sr.*

Flood's application shows work as an electrician for various employers up to 1988. Thereafter, it states, he worked as an "electrician and union organizer" for the Union.⁵⁹ On cross-examination, Flood denied that he was paid as an organizer at the time of his application. He applied because he needed work. Subsequently, in January 1995, Flood received a paying job as an organizer with the Union.

Flood was employed previously by Respondent at a hospital job in 1991. His separation report lists him as excellent or good in all categories, and states that he was eligible for rehire.⁶⁰

Flood was working on the hospital job in 1991. He said that he left the job because he felt that Respondent's work was substandard. Subsequently, another employee filed charges against the Company with the state licensing agency. Flood was served with a subpoena by this individual, and executed an affidavit dated April 8, which supported the charges.⁶¹ Office Manager Richard Zeron testified that he received a copy of this affidavit together with the charges against the Company.

Flood returned to the office on April 15, with duplicate applications. Zeron called him into his office, and challenged the assertions in Flood's affidavit. According to Zeron, Flood did not rebut Zeron's claim that the charges against the Company did not have merit. There was a subsequent hearing before the state licensing board, in November or December, at which Flood testified against the Company. Zeron affirmed that the charges against the Company were dismissed. He stated that he did not want Flood as an employee because

of this matter, but made no recommendation to General Superintendent Ball.

Flood testified that he was working in March for another company which had a job at the "Miles Complex" in Charleston. Respondent was also working on this job, and its foreman was Norman Mastalz, later to be promoted and transferred to the job in Winston-Salem, described above. Flood had previously known Mastalz, and told him in late March on the Miles Complex job that he had applied for work with Respondent. Mastalz "laughed and snickered" and told Flood that neither he nor anybody else in the Union would be employed by the Company. Mastalz denied this conversation. Flood was the more truthful witness, and I credit his testimony.

C. *The Employment of Samuel Grimsley—the Absence of Union Employees*

Samuel Grimsley was not a union member. He applied for work on May 2. His application had no indication of union affiliation,⁶² and Grimsley did not wear any union insignia. He had never worked for Respondent previously. He was hired immediately and went to work the next day.

Grimsley worked for about a month. He testified that there were no union employees. General Superintendent Ball confirmed that the Company did not have a union contract at any of its jobsites.

D. *The Filing of the Charge, and Respondent's Communications With Some of the Applicants*

The Union filed the charge in the North Charleston case on May 6.⁶³ Thereafter, in June, the Company purported to offer employment to several of the applicants complaint issued on June 17.

VII. LEGAL CONCLUSIONS ON THE ALLEGED REFUSAL TO CONSIDER AND HIRE THE APPLICANTS

A. *The North Charleston Case*

The Board has stated the following requirements to establish a discriminatory refusal to hire:

Essentially, the elements of a discriminatory refusal-to-hire case are the employment application by each alleged discriminatee, the refusal to hire each, a showing that each was or might be expected to be a union supporter or sympathizer, and further showings that the employer knew or suspected such sympathy or support, maintained an animus against it, and refused to hire the applicants because of such animus. [*Big E's Foodland, Inc.*, 242 NLRB 963, 968 (1979).]

On March 1, seven of the nine alleged discriminatees together filed applications at the Company's office, and were told to return on March 4, for a meeting with General Superintendent Ball. They returned, but Ball was not present. They were told that they would be "contacted," and that hiring would thereafter be done at the jobsite. I conclude that the applicants submitted applications which required no further action to perfect them.

⁵⁷ G.C. Exh. 30.

⁵⁸ G.C. Exh. 35.

⁵⁹ G.C. Exh. 21.

⁶⁰ G.C. Exh. 28.

⁶¹ R. Exh. 15.

⁶² G.C. Exh. 29.

⁶³ G.C. Exh. 1(a).

John C. Frazier also filed an application on March 1, and Joel Yon did so on April 15. Neither was told that he had to do anything further to complete the application, and I conclude that they were valid applications.

There is no doubt that the Company knew that the seven applicants who filed together on March 1 were union sympathizers. Thomas Flood Sr. announced it in the office, some of the applicants wore union insignia, some of the applications frankly stated union affiliation, and some listed former employers who employed union personnel. Finally, General Superintendent Ball admitted knowing this.

I reach the same conclusion with respect to Frazier and Yon, who applied separately. Both were union members, and both listed as former employers only companies that employed union employees. Ball admitted knowing this with respect to one of Yon's former employers. These listings are sufficient to warrant a finding of company knowledge of the union sympathies of the applicants. *KRI Constructors*, 290 NLRB 802 (1988); and *Alexander's Restaurant & Lodge*, 228 NLRB 165 (1977).

Despite the fact that the job started in March with three electricians, and the Company had more at the jobsite in April and May, the Company did not employ any of the applicants, had no union electricians at the jobsite, and in fact, did not have any at any of its jobsites. This disparity is sufficient to warrant an inference of animus against union members and sympathizers. In addition, the Company engaged in evasive tactics in order to avoid hiring union sympathizers. General Superintendent Ball was not present for interviews on March 4, after the applicants were told to be there for that purpose. Superintendent Kelly's responses to Douglas Michi's repeated efforts to get employment at the jobsite constituted further evasion. Finally, the Company's unfair labor practices at the Winston-Salem jobsite buttress a conclusion that it had animus against union sympathizers.

The Company argues that Thomas Flood Jr. was a high school student and could not have accepted part-time work at the time of his application.⁶⁴ The Company never tested this with a job offer. Flood graduated from high school in May, at a time when the Company needed employees and Flood had an application on file. Flood requested a position as an apprentice, and the evidence shows that the Company hired numerous helpers. I conclude that Flood was qualified to be a helper.

Respondent further argues that the reason it did not hire Thomas Flood Sr. was his participation with a former employee in civil litigation against the Company. However, this dispute was not ongoing at the time Flood filed his application on March 1. His affidavit in support of the litigation was dated April 8, more than 5 weeks after his application. The Company needed electricians according to Superintendent Kelly's statement to Douglas Michi, on March 25, and the actual electricians which it hired. The first evidence of Company knowledge of Flood's participation in the civil litigation was on April 15, when Flood talked with Office Manager Zeron.

Although the Company was hiring at or shortly after the applications, a finding of a discriminatory refusal to hire does not depend on the existence of a vacancy. In this connection, the Board has stated:

Under the Act, an employer must consider a request for employment in a lawful, nondiscriminatory manner, and the question whether an applicant has been given such consideration does not depend upon the availability of a job at the time an application for employment is made. Consequently, the Act is violated when an employer fails to consider an application for employment for reasons proscribed by the Act and the question of job availability is relevant only with respect to the employer's backpay obligation. [*Shawnee Industries*, 140 NLRB 1451, 1452-1453 (1963), enf. denied on other grounds 333 F.2d 221 (10th Cir. 1969).]

A determination of job availability and possible backpay liability is left to the compliance phase of the proceeding. *Apex Ventilating Co.*, 186 NLRB 534 fn. 1 (1970). The Court of Appeals for the Fourth Circuit has stated that the requirement of job availability is satisfied "if the employer at the time of the purportedly illegal conduct was hiring or had concrete plans to hire employees." *Ultra Systems Western Constructors v. NLRB*, 18 F.3d 251, 256 (4th Cir. 1994). Respondent in this case was both hiring and had concrete plans to hire at the time of its refusal to consider or employ Flood and the other applicants.

Respondent introduced a document announcing categories of hiring priorities. The first two were (1) current company employees (transfers), and (2) former employees with good records.⁶⁵ Since the Company had no union employees at the K-Mart job, and no union contracts anywhere, the effect of this system was to preclude union members from employment. *D.S.E. Concrete Forms*, 303 NLRB 890 (1991). However, when former employees Thomas Flood Sr. and David Vella applied, the Company did not hire them. Samuel Grimsley was neither a union member nor a former employee. When he applied, he was hired immediately and went to work the next day. This disparity graphically portrays the discriminatory nature of Respondent's actual hiring policy.

Finally, the Company argues that it did make offers to some of the applicants. However, they came only after the unfair labor practice charge had been filed, are questionable as to whether they constitute offers of employment, and are appropriately left to the compliance stage of this proceeding.

As for the availability of jobs, the existence of jobs at other of Respondent's jobsites may appropriately be considered. The applicants did not specify any particular jobsite in their applications, and the existence of jobs at other locations was stated to them by Superintendent Kelly. *Ultrasystems Western Constructors*, 310 NLRB 545 (1993).

I conclude that eight of the applicants at the North Charleston jobsite filed valid applications on March 1,⁶⁶ and that one of them, Joel Yon Jr., filed on April 15. Respondent failed to consider these applications and failed to employ the applicants because of their union membership or sympathies. Accordingly, Respondent violated Section 8(a)(3) and (1) of the Act.

⁶⁵ R. Exh. 16.

⁶⁶ Thomas Flood Sr., Thomas Flood Jr., Douglas Michi Jr., Sean Taylor, Vernon Taylor, David Smiht, James Anderson, and John Frazier.

⁶⁴ R. Br. 34.

B. The Winston-Salem Job

Respondent argues that although the union members were not full-time union organizers, “they were subject to the local union’s job salting organizing resolution, pursuant to which they could work for non-union employers only if they worked for organizational purposes and were expected to leave the job upon notification by the Union.”⁶⁷ Accordingly, Respondent continues, they were not bona fide applicants for employment, citing the Eighth Circuit Court of Appeals decision in *Town & Country Electric v. NLRB*, 34 F.3d 625 (1994), denying enf. of 309 NLRB 1250 (1992).

There is no credible evidence to support the factual premise of this argument. There is no documentary evidence of a “salting resolution,” and Business Manager Maurice denied that there was one. Although some of the witnesses said there was a “salting agreement,” their description portrayed it as an agreement to try to persuade employers to use union labor (Farley), or, simply, to organize the employer’s employees. This is no more than a statement of their statutory rights.

Respondent made extensive efforts on cross-examination of the General Counsel’s witnesses to establish that they were required to obey an order from the Union to resign and go to another job once the shop was organized. These attempts were unsuccessful. There is no evidence that any members were paid anything by the Union for their organizational work.

Respondent puts special emphasis on the cases of Good, Vogler, and Parsons. The first two stated on their applications that their purpose was to organize Respondent’s employees, and all were referred to the job by Business Agent Maurice.⁶⁸

However, all three applicants gave a persuasive reason for seeking the K-Mart job, even at the lower rate of pay—they were driving excessive miles to get to their current job, and the Company’s jobsite was closer to home.

The circumstances upon which the Eighth Circuit based its denial of bona fide status to union organizers in *Town & Country*, supra (34 F.3d at 629), are not present here—there was no union pay of any kind; there was no “requirement” that they could work for nonunion employers “only” if they performed organizational duties; and the Union had no authority to require them to leave and take a job with another employer.

I conclude that all the union members were bona fide applicants for employment *Fluor Daniel, Inc.*, 304 NLRB 970 (1991), and *Casey Electric*, 313 NLRB 774, 786 (1994).

Gary Maurice was an employee of the Union, a job which he intended to keep, performing his union duties during “off-hours.” Although he intended to organize the employees, Maurice testified that a job with Respondent would have been his primary job. Maurice was unable to “speculate” on whether he would have left this job if the employer’s employees had become organized. There is no evidence that he would have been required to leave.

The Board’s position is that “full-time paid union organizers are ‘employees’ entitled to the Act’s protection.” *Town & Country Electric*, 309 NLRB 1250, 1258 (1992); and *Sunland Construction Co.*, 309 NLRB 1224, 1230 (1992).

Some of the circuit courts of appeal have agreed with the Board,⁶⁹ while others have disagreed.⁷⁰ It would serve no useful purpose to repeat the contending arguments. This issue is presently before the Supreme Court. In the meantime, I am bound by Board law, and conclude that Gary Maurice was a bona fide applicant and an “employee” entitled to the protection of the Act.

The evidence detailed above shows that from March 30 through mid-July, Respondent received 14 applications from applicants who were qualified electricians, and whom it knew to favor the Union. The Company failed to hire them at times when it needed electricians, and was hiring other applicants who did not evidence any union affiliation. It also engaged in the unlawful acts of interference with employee rights set forth above, and unlawfully discharged Gregory Davis.

On August 3, a week after the Union filed the initial charge in the Winston-Salem case, Respondent sent letters to some of the applicants suggesting that they go to the jobsite and “arrange for a drug test.” I have found that the drug test was discriminatorily implemented so as to impact known union supporters while excluding existing employees who did not engage in the strike on July 23. I conclude that the letters did not constitute offers of employment.

Stephen Pope was actually hired by a temporary employment service. Nothing was said about a drug test. When he arrived for work, Mastalz learned that he was affiliated with the Union. After 2 days of work by Pope, Mastalz said that the fees of the employment service were “too high,” but that he could hire Pope “directly.” However, Pope would have to take the drug test. When Pope refused, Mastalz discharged him. This was a pretext engaged in for the purpose of giving Mastalz an opportunity to discharge an employee who, he learned, favored the Union.

The complaint alleges that Respondent failed to hire Pope on August 11. Actually, he was hired by the temporary service on behalf of the Company. The fact that Mastalz let Pope work for 2 days shows that the temporary service was an agent of Respondent. I conclude that Pope was discriminatorily discharged on August 11, and that the matter has been fully litigated.

Waco Cottingham had been hired directly by the Company, but made the mistake of having lunch with Pope, then known to be a union adherent. After already being hired, Cottingham was discharged on August 11 for refusal to take the discriminatory drug test. The circumstances of this discharge were also fully litigated.

I conclude that the reason for the discharges of Pope and Cottingham was their union sympathies, and that Respondent violated Section 8(a)(3) and (1) of the Act in doing so.

The fact that Daniel Vella’s application was submitted by another employee does not impair its authenticity under established Board law. Indeed, the Company tacitly recognized this by sending Vella one of its August 3 letters.

⁶⁹ *Willmar Electric Service v. NLRB*, 968 F.2d 1327, 1329–1331 (D.C. Cir. 1992), cert. denied 113 S.Ct. 1252 (1993); and *NLRB v. Henlopen Mfg. Co.*, 699 F.2d 26, 30 (2d Cir. 1997). See also *Escada (USA) Inc. v. NLRB*, 970 F.2d 89 (3d Cir. 1992), enf. without comment 304 NLRB 845 (1991).

⁷⁰ *Town & Country Electric v. NLRB*, supra; *NLRB v. Elias Bros. Big Boy*, 327 F.2d 421, 427 (6th Cir. 1964); and *H. B. Zachry Co. v. NLRB*, 886 F.2d 70 (4th Cir. 1989).

⁶⁷ R. Br. 44.

⁶⁸ R. Br. 45.

I conclude that the applicants filed valid applications on the dates indicated below.⁷¹ Respondent failed to consider and failed to hire the 14 applicants because of their union affiliation in violation of Section 8(a)(3) and (1) of the Act.

I receive General Counsel's Exhibit 6.

In accordance with my findings above, I make the following

CONCLUSIONS OF LAW

1. Eldeco, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Brotherhood of Electrical Workers, Local 776, AFL-CIO, and International Brotherhood of Electrical Workers, Local 342, AFL-CIO are labor organizations within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act at its Winston-Salem, North Carolina jobsite by (1) advising its employees that a foreman had been hired to keep the jobsite union free; (2) interrogating employees regarding the union activities of other employees; (3) threatening employees with unspecified reprisals for engaging in union activity; (4) telling employees that there would not be any union employees on the job; (5) telling an employee that he was being terminated because of his union activities; (6) creating the impression that Respondent was engaging in surveillance of its employees' union activities; (7) promulgating and disparately enforcing a drug-testing policy in order to discourage union activities of its employees; and (8) telling employees that the purpose of the drug-testing program was to get rid of union employees.

4. Respondent violated Section 8(a)(3) and (1) of the Act by:

(a) Discharging employees Gregory Davis on July 23, 1994, and Stephen Pope and Waco Cottingham on August 11, 1994, because of their union activities and sympathies.

(b) Failing to consider for employment and failing to employ the applicants listed on the attached Appendix A, because of their union sympathies and activities.

5. The foregoing unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

6. Respondent has not violated the Act except as specified here.

REMEDY

It having been found that the Respondent has committed certain unfair labor practices, it will be recommended that it be ordered to cease and desist therefrom, and to take certain remedial actions intended to effectuate the policies of the Act.

It having been found that Respondent unlawfully discharged Gregory Davis on July 23, 1994, and Stephen Pope and Waco Cottingham on August 11, 1994, it is recommended that Respondent be ordered to offer each of them reinstatement to his former position, without prejudice to his seniority or other rights and privileges previously enjoyed. It is further recommended that each of them be made whole for any loss of earnings and other benefits he may have suffered by reason of Respondent's conduct from the date of his unlawful discharge to the date of Respondent's offer of reinstatement, in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).⁷² I shall also recommend that Respondent be required to remove from its records all references to their discharges, and notify the discriminatees that it has done so, and will not rely on same for any future discipline of them.

I shall further recommend that the duration of the remedy, including whether Davis, Pope, or Cottingham would have been transferred to other of Respondent's jobs, be left to the compliance stage of the proceeding. *Dean General Contractors*, 285 NLRB 573 (1988).

It having been found that Respondent unlawfully refused to consider for employment and to employ the individuals listed on Appendix A, it is recommended that Respondent be ordered to offer them employment and make them whole for any loss of earnings they may have suffered, as determined in compliance proceedings as set forth above.

[Recommended Order omitted from publication.]

⁷¹ Kim Farley, Larry Morgan, Paul Vogler, Patrick Parsons, Mack Good, Allen Samuels, Randy Penn, and Gary Maurice—all on March 30; Stanley Thompson, April 2; Michael Thompson on April 12; Russell Hawks on June 1; Kenneth Hanks on June 9; Daniel Vella on June 22; and John Compton on July 13.

⁷² Under *New Horizons*, interest is computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest accrued before January 1, 1987 (the effective date of the amendment) shall be computed as in *Florida Steel Corp.*, 281 NLRB 651 (1977).